IN THE

Supreme Court of the United States

No. 74-563

OCTOBER TERM—1974

NORMAN GOLDSTEIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Norman Goldstein, prays that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit, entered October 10, 1974 (Appendix A, *infra*) which affirmed the judgment of the United States District Court, Southern District of New York, whereby the said petitioner was convicted of a conspiracy to violate the federal narcotic laws in violation of 21 U.S.C. Section 846, the first count in the indictment.

As a consequence, the said petitioner was sentenced to a term of eight (8) years and additionally a three (3) year special parole was imposed upon him, together with a $25,000 fine.

THE OPINION OF THE COURT BELOW

The opinion of the Court below, namely the United States Court of Appeals for the Second Circuit, affirming the said judgment of conviction, is set forth in Appendix A as aforesaid.

JURISDICTION

The order and judgment of the United States Court of Appeals, Second Circuit, is dated October 10, 1974. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254 (1).

QUESTIONS INVOLVED

A. Whether the evidence adduced established beyond a reasonable doubt that there was one overall conspiracy rather than separate and multiple conspiracies and whether there was sufficient evidence to support the jury's verdict that the petitioner was a member of any conspiracy?

B. Was the petitioner denied a fair trial in that the government failed to furnish him with vital material required under 18 U.S.C. 3500 thereby depriving the petitioner of a meaningful cross examination of one of the government's main witnesses, namely, Lipsky?

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5:

"No person shall be held to answer for a capital, or

otherwise infamous crime, unless on presentment or indictment of a Grand Jury, . . ."

Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with witnesses against him; . . ."

21 U.S.C. 846

"Attempt and Conspiracy:

"Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

18 U.S.C. 3500 (as it applies to this case):

"3500 Demand for Production of Statements and Reports of Witnesses: (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or perspective government witness (other than the defendant) to an agent of the government shall be the subject of subpoena, discovery or inspection, until said witness has testified on direct examination in the trial of the case."

(b) After a witness called by the United States has testified on direct examination the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . ."

STATEMENT OF THE CASE

The indictment in this case joined twenty-eight (28) defendants and six (6) co-conspirators named therein as

such but unindicted. Eighteen (18) of the original defendants were tried in the action. Two (2) of the defendants were severed during the course of the trial, two (2) others were granted judgments of acquittal at the completion of the government's case. Of the fourteen (14) defendants who proceeded to the verdict, three (3) were acquitted by the jury and the other eleven (11) were convicted. This trial ran from June 15, 1973 to July 12, 1973 and the trial record was approximately 4,500 pages.

The government witnesses testified as to the activities of the two (2) principal co-conspirators, one Herbert Sperling and one Vincent Pacelli.

A principal witness for the government was one Barry Lipsky who identified himself as a co-conspirator with a severed co-defendant, Pacelli. Lipsky testified that fifteen (15) of the defendants and four (4) of the co-conspirators, unindicted but joined in the indictment as co-conspirators, were members of a group headed by Pacelli. These members included Lipsky who described the storing of narcotics for Pacelli and also described his services as a messenger. Lipsky also testified that one Albert Perez and Al Bracer were Pacelli's partners; Frank and Antoinette Bassi banked Pacelli's money and also stored his drugs; another defendant, Juan Serrano, was a source of cocaine to Pacelli; Lipsky described Edgardo Ramariez as providing Pacelli with the various delutents to mix the drugs and also as acting as one of his messengers; one Jack Bless was described as being a source of heroin to Pacelli.

Lipsky also testified that Pacelli enterprise sold cocaine to Fred Berger, Jack Bless and Louis Valentine. Valentine was said to have sold the cocaine to a Nelson Garcia and Antonio Delbusto. The jury through this witness, heard other names in connection with Pacelli's activity, namely Edward Bless, Susan Weyl, Nicholas Lugo and Peter Aponte.

The government's proof showed that Pacelli and his colleagues dealt mainly in cociane.

Insofar as the petitioner was involved there was no showing that he was invoived, associated, participated or even knew anybody in regard to the Pacelli enterprise.

The government assigned a role to the petitioner in the operation of one Herbert Sperling. The government did this through the testimony of one Joseph Conforti, who identified himself as a participant in an enterprise headed by Sperling and related that one Cecile Mileto and Zelma Vance, each of those ladies was the wife and girlfriend respectively of one Louis Mileto who was a former member of the Sperling enterprise. Witnesses for the government testified as to thirteen (13) of the defendants and two (2) of the unindicted co-conspirators who participated in the enterprise headed by Sperling. These were Cecile Sperling, who warehoused Sperling's drugs; Louis Mileto and Sam Kaplan acted as messenger for Sperling; Ben Mallah, Joseph Conforti, Carlo Lombardi, Jack Spader, Peter Schwash and petitioner were said to have occupied various capacities in aiding Sperling.

Specifically in regard to the petitioner the government produced a witness named Joseph Conforti. Conforti testified that he met petitioner and gave him the heroin he had taken from the apartment of one Vance. That he accompanied petitioner to a hotel room where he stored the contents of Vance's apartment and that he mixed heroin with petitioner for Sperling on three or four occasions. That he mixed heroin with another conspirator named Schwack and petitioner on five to eight occasions and that he further mixed heroin with petitioner on eight to twelve occasions. That he also met with petitioner, Sperling, and one Spada.

Returning to Lipsky, Lipsky testified as to drug sales and

transactions between Herbert Sperling and Vincent Pacelli. These included two sales of cocaine from Pacelli to Sperling; two sales of heroin from Sperling to Pacelli. These four transactions took place between May and December 1971.

Two agents of the federal government testified that they purchased heroin from one Mark Rider and Paul Carter. These buyers were not named in the indictment as either defendants or unindicted co-conspirators and were further not identified as participants in the Pacelli enterprise or the Sperling enterprise.

REASON FOR GRANTING THE WRIT:

A. THE ISSUE AS TO THEIR BEING MULTIPLE CONSPIRACIES AND NOT ONE OVERALL CONSPIRACY AS CHARGED IN THE INDICTMENT.

The 5th Amendment to the Federal Constitution requires that nobody can be convicted of a felony unless a grand jury first indicts them. The grand jury in this case charged in the conspiracy count one overall conspiracy. If there were more than one conspiracy as has been shown, there were three separate conspiracies, then petitioner was not convicted on what the grand jury charged.

There is no need to expound to this Court the inherent unfairness of a mass conspiracy trial with the fall-out on fringe members of a group, such as hearsay, venue, and confusion to the jury, all of which were adequately described in *Kotteakos v. United States*, 320 U.S. 750 (1946). The theory underlying criminal conspiracy which carries imprisonment has imported concepts derived from commercial usages involved in the law of partnership and agency. See *Pinkerton v. United States*, 328 U.S. 640;

Fiswick v. United States, 329 U.S. 111 holding that a conspiracy is a "partnership in crime".

In this case the grand jury did not charge the petitioner with the commission of any substantive crimes as it did other defendants in the case.

A conspiracy, it is submitted, is an agreement; see *United States v. Borelli*, 336 F.2d 376, 384 (Cir. 2d, 1964). It is further submitted that a co-conspirator may not be held responsible for acts beyond the scope of the particular conspiracy or agreement to which it was alleged he was a participant.

The facts in this case disclose that there were three (3) independent conspiracies, namely, the Sperling group, the Pacelli group and the third one involving Mark Rider and Paul Carter. These separate groups acted in each respective self-interest of the group. At most that could be said was that there were four (4) drug sales between the Sperling group and Pacelli. However, there was no core control of one conspiracy as is described in *United States v. Agueci*, 310 F.2d 817, 826 (Cir. 2d, 1962). There was no proof whatsoever that the members of each respective group shared a common aim which is usually the basis of one overall conspiracy.

In *Rocha v. United States*, 288 F.2d 545 (Cir. 9th, 1961) the defendants were charged with a conspiracy in a single count. The scheme was to defraud the United States by having each defendant obtain a preferred immigration status by means of false marriages with United States citizens. It was held that six conspiracies had been established because each couple was not interested in any marriage but its own. The Court reversed the conviction even though one of the indicted co-conspirators was a witness at trial and was responsible for all the marriages in question. See also *United States v. Varelli*, 407 F.2d 735

(Cir. 7th, 1969). The jury in this case heard evidence that not only related to the Pacelli group but there was also evidence relating to the Sperling and Rider-Carter conspiracies. This, it is submitted, affected the jury's difficult task of considering the case against each of the accused separately; see *United States v. Kelly*, 349 F.2d 720 (Cir. 2d, 1961; at 759.

Furthermore, there was prejudice created by the Court's charge stating that once an accused was found to be a member of the single overall conspiracy he could be held responsible for the acts of his co-conspirators.

As was acknowledged in *Kotteakos v. United States, supra*, 320 U.S. at pages 766-767 there is substantial prejudice suffered by an accused where he is included in a multiple conspiracy trial where there are a great number of defendants and a great mass of testimony in regard to the other conspiracies. See also *United States v. Baker*, 419 F.2d 83, 88 (Cir. 2d 1969).

By the government joining the three separate groups as one alleged overall conspiracy, and having a joint trial, the number of defendants were increased from fifteen (15) to twenty-eight (28) defendants, the number of defendants going to trial being from eleven (11) to eighteen (18) and the amount of testimony from government witnesses being had on pages 504-1519, 2398-2443, 2722-2790 as to the Pacelli conspiracy. Testimony in regard to the Sperling group is found on pages 1516-2718 of the trial transcript.

Proof at trial showed that the Pacelli group operated between May and December 1971; the Sperling group allegedly operated from early 1971 to April 1973. Thus there was an extension of the existence of the conspiracy rendering each participant liable for actions which occurred after his participation may have ended.

It is respectfully submitted, that the Court below itself

may have had doubts as to whether there was one overall conspiracy, for the opinion of the Court below, slip opinion dated October 10, 1974 page 5637 stated on pages 5664-5665 that:

> "In view of the frequence with which the single conspiracy vs. multiple conspiracies claimed is being raised on appeals before this Court, . . . we take this occasion to caution the government with respect to future prosecutions that that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which could prove seriously detrimental to the government itself. We have already eluded to our problems at the Appellate level where we have had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants."

It is respectfully submitted to this Court that if the erudite Court below expressed difficulty in considering the

case against each accused individually, a jury of laymen must be presumed to have been incapable of doing so. See *Bruton v. United States*, 391 U.S. 123 (1968).

The proof against the petitioner consisted of the fact that he was present on occasions with other members of the Sperling group and participated in the mixing of the narcotics that Sperling dealt with. Yet the petitioner was not charged with the commission of a substantive crime. It is respectfully submitted that the government's proof, considered favorably to the government should have been embodied in a charge of a substantive crime rather than the nebulous charge of conspiracy.

See *"The Unnecessary Crime of Conspiracy"*, 61 California Law Review, September 1973, page 1137, et seq. On pages 1148 and 1149 the author of that article commented as follows:

> ". . . Model Penal Code. Defines conspiracy in terms of one person agreeing with another, rather than two or more persons entering into an agreement. This semantic change was intended among other things to make it possible to find each of the members of a criminal enterprise guilty of a different conspiracy, depending upon what he individually agreed to do . . ."

On page 1150 it was stated that:

> ". . . a far better way to determine the scope of one's individual liability for the conduct of another would be to abandon conspiracy altogether with its notions of business enterprises in general partnerships, and look instead to the policy underlying the specific prohibitions at issue . . ."

". . . but these elementary propositions of business economics have nothing to do with criminal culpability. Absent the confusing concepts that conspiracy introduces, the courts probably would not even consider holding each participant for the crimes of the entire enterprise."

B. As to the Denial of a Meaningful Confrontation of the Evidence

As the oipinion of the Court below states, certain convictions of the co-defendants were reversed because certain letters of the principal witness Lipsky were not given to defense counsel so as to effectively cross examine Lipsky. The Court below however, decided that petitioner was not affected because there was other evidence through other witnesses upon which the jury verdict could properly be based.

Confrontation of witnesses means effective cross examination. See *Alford v. United States.*, 282 U.S. 687 (1931); *Davis v. Alaska*, 39 L.Ed. 2d 347 (1974).

The Court below on pages 5662-5663 of the slip opinion concluded that the case against the petitioner would not have been affected had petitioner's counsel been given the statements of Lipsky at the proper time. However, this deprived the petitioner of a more effective cross examination an examination that would have been devastating in regard to Lipsky and it is put that the Court below, an appellate court, should not have decided just what the jury rested its guilty verdict upon. There was no way of knowing that. The fact that trained judges found sufficient evidence to convict your petitioner, does not mean that the jury reasoned the way the learned court did below. The principal evidence as to petitioner was one

Joseph Conforti, an admitted participant in narcotic trafficking. As argued in the court below there was no other evidence corroborating Conforti's testimony in regard to petitioner. It is inconceivable that the jury of laymen did not consider petitioner's case not only from the point of view of Conforti's testimony but also of Lipsky's.

Actually what the court below did was to hold that the denial of the written material to petitioner's counsel during the trial, was no more than harmless error and did not affect the case against the petitioner. However, aside from the requirements of 18 U.S.C. 3500, the 6th Amendment right of confrontation for effective cross examination was breached. Hence it is submitted the government had the burden to show that this error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18 (1967) holding that the court has to determine beyond a reasonable doubt that the error did not contribute to the verdict.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted.

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